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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1571

BILL RANSOM, *Petitioner*

v.

FRANCES HUGH BRENNAN, EXECUTRIX OF THE ESTATE OF WILLIAM J. BRENNAN, *Respondent*

RESPONDENT'S BRIEF

QUESTION PRESENTED

Upon the death of a party to a diversity action, does Fed. R. Civ. P. 25(a)(1) clothe the district court within personam jurisdiction over a non-resident executrix when plaintiff's counsel mails a notice of the motion to substitute to decedent's counsel but does nothing to cause the executrix to be served?

STATEMENT OF THE CASE

Petitioner, Ransom, filed this diversity action in Houston, Texas, against William Brennan, an Alabama citizen,

alive at the time suit was instituted, on alternative theories of breach of an oral contract and quantum meruit, to recover commissions allegedly due for his assistance in arranging the financing of a DC-9 jet aircraft. When Brennan died after he had filed a formal answer, his attorneys filed a suggestion of death (Rec. 10). Less than ninety days later, petitioner filed a motion asking the Court to substitute Frances Brennan, an Alabama resident and citizen, who was the duly constituted Alabama executrix of Brennan's estate, as defendant (Rec. 11). As indicated on the certificate of service attached to the notice of the motion to substitute (Rec. 12), petitioner's counsel attempted to serve the executrix with the motion and notice by mailing a copy thereof to William Brennan's attorneys in Houston. Service of process was not even attempted. Following the order of substitution, entered April 9, 1968 (Rec. 12), the executrix filed a motion under Fed. R. Civ. P. 12(b), asking for dismissal because, among other things, she had not been served and the court had no jurisdiction (Rec. 12).

By that motion and the affidavits attached (Rec. 12), she demonstrated that no one had served her with the motion or the notice regarding substitution, or the hearing thereon. The district court by memorandum opinion [Rec. 19; see also *Ransom v. Brennan,* 46 F.R.D. 16 (S.D. Tex. 1969)] overruled her motion. She formally answered on the first day of trial, but judgment was subsequently entered against her for $30,000.00 plus interest and costs. The district court's ruling on her 12(b) motion precipitated her appeal to the Fifth Circuit, where her jurisdictional point was sustained.

ARGUMENT

1. Service is Required to Achieve In Personam Jurisdiction.

In personam jurisdiction is universally attainable by service of the summons and complaint upon the person of an individual sought to be made a party (or by certain well defined modes of "substituted service"—not to be confused with "substitution" of a party as hereinafter discussed). Fed. R. Civ. P. 4; *Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438, 444-45 (1946); *Royal Lace Paper Works, Inc. v. Pest-Guard Products, Inc.,* 240 F.2d 814, 816 (5th Cir. 1957). Frances Brennan's uncontradicted affidavit (Rec. 12) establishes petitioner's failure to serve her with process. Unless petitioner has somehow complied with one of the variegated modes of substituted service, or unless his actions in an attempt to comply with Fed. R. Civ. P. 25(a)(1) suffice to bestow in personam jurisdiction, then such jurisdiction was never conferred upon the district court.

2. No Substituted Service was Effectuated.

Petitioner apparently takes the position that the mailing of the notice and motion to substitute to William Brennan's counsel, after Brennan died, discharged his obligation to follow the procedures necessary to vest the district court with in personam jurisdiction over the person of Frances Brennan. The only conceivable alternative method of substituted service to which he may be alluding is that clause of Fed. R. Civ. P. 4(d)(1) which provides for service by ". . . delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." Since the documents mailed to counsel for William Brennan, then deceased, (a) were not served, but, rather, were mailed and

(b) were not copies of the summons and complaint, petitioner would have difficulty claiming he is in compliance with the rule.

Even if the documents so mailed be deemed sufficient, and the mailing be considered a "service", Fed. R. Civ. P. 4(d)(1) still would not furnish a basis for a determination that service had been perfected. "Cases dealing with agency by appointment indicate that an actual designation for the specific purpose of receiving process normally is expected." 4 Wright & Miller, Federal Practice and Procedure: Civil, § 1097 (1969); *Szabo v. Keeshin Motor Express Co., Inc.,* 10 F.R.D. 275 (N.D. Ohio 1950); *Fleming v. Malouf,* 7 F.R.D. 56 (W.D. N.Y. 1947). Consequently, service on one's attorney (assuming that Kline was Frances Brennan's attorney at the time of service—a fact which the record does not establish) is insufficient to invoke the court's in personam jurisdiction where, as here, the attorney was not specifically appointed to accept or receive service. *Christensson v. Hogdal,* 199 F.2d 402 (D.C. Cir. 1952); cf. *Schwarz v. Thomas,* 222 F.2d 305 (D.C. Cir. 1955); *WICA, Inc. v. WWSW, Inc.,* 191 F.2d 502 (D.C. Cir. 1951). *Rende v. Kay,* 415 F.2d 983 (D.C. Cir. 1969), cited by petitioner, is irrelevant to the question of the necessity of service; and while plaintiff raised the insufficiency of the suggestion of death there (since the ninety day period had expired), petitioner has never so complained herein.

3. Petitioner's Actions Under Rule 25(a)(1) Were Insufficient to Confer In Personam Jurisdiction.

Clearly petitioner did not comply with Fed. R. Civ. P. 25(a)(1), regulating substitution of parties in the case of death during the pendency of an action:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

Fed. R. Civ. P. 5, mentioned in Rule 25(a)(1), permits service of the motion and notice upon the attorneys for persons *already parties* at the time of death, but Frances Brennan was not a party at the time her husband died, for she is the very individual whom the petitioner sought to substitute in light of his death. Hence, the notice and motion were not served upon the executrix in the manner provided by Fed. R. Civ. P. 4. Presumably acting under Fed. R. Civ. P. 5, counsel for petitioner mailed the motion to the decedent's attorney, making the customary certificate of mailing (See opinion of Fifth Circuit, as yet unreported, Brief for Petitioner, App. B, p. 13). Thus, as service was not perfected in accordance with Rule 25(a)(1), Frances Brennan was never "substituted" properly; and the district court failed to acquire in personam jurisdiction over her.

The decision of the district court (and apparently the position of petitioner) is molded upon the theory that, as in personam jurisdiction was acquired over William

Brennan, it was not necessary to reacquire it over the person of Mrs. Brennan. Presumably (although no holding can be found to support the proposition), had Ransom served Frances Brennan with the motion and notice pursuant to Rule 25(a)(1), service of the summons and complaint would not have been necessary. On the other hand, a cogent argument could be made that Rule 25(a)(1) only relates to the mechanics of substitution and not to the acquisition of in personam jurisdiction over a new party thus requiring, in effect, a "double service" of (1) the motion and notice and (2) the summons and complaint. We are fortunately not faced with that situation here, although the court of appeals concluded that service of the motion and notice would have been sufficient. (See Brief for Petitioner, App. B, p. 17).

Adopting the dictum of *Bertsch v. Canterbury,* 18 F.R.D. 23 (S.D. Cal. 1955) the district court held petitioner's actions sufficient on the theory that acquisition of in personam jurisdiction was not necessary. That action seems to have resulted from a confusion of the principles of in personam jurisdiction with those of diversity jurisdiction. A pointed distinction exists between federal jurisdiction for diversity purposes and in personam jurisdiction. Federal jurisdiction for diversity purposes, once validly existing between the original parties, is not affected by substitution under Rule 25(a)(1), as long as the same right of action is asserted after substitution as before. See *Hardenbergh v. Ray,* 151 U.S. 112 (1894); *Phelps v. Oaks,* 117 U.S. 236 (1886); *Jones v. Village of Proctorville, Ohio,* 303 F.2d 311 (6th Cir. 1962); *Ford, Bacon & Davis, Inc. v. Volentine,* 64 F.2d 800 (5th Cir. 1933); *Cross v. Evans,* 86 Fed. 1 (5th Cir. 1898).

That, however, is a far cry from holding that a federal court may extend its power to a non-resident potential substitute with no service whatsoever. It is, therefore, submitted that the *Bertsch* dictum is erroneous in that respect, as so held by the Court of Appeals for the Fifth Circuit.

McCann v. Bentley Stores Corp., 34 F.Supp. 231 (W.D. Mo. 1940) is not in point at all, and is apparently cited by petitioner for its reference to the holding in *Burnham v. First National Bank of Leoti,* 53 Fed. 163, 165 (8th Cir. 1892) that one who *voluntarily* appears as a substitute defendant cannot challenge federal jurisdiction. The case is obviously distinguishable, for the filing of respondent's 12b motion makes her appearance here involuntary as to the jurisdictional issue.

CONCLUSION

Respondent, accordingly, asks the Court to deny the Petition on the ground that, clearly, no in personam jurisdiction existed over the executrix, Frances Brennan; and hence, none of the requirements of U. S. Sup. Ct. R. 19 have been met.

Respectfully submitted,

RONALD C. KLINE
BRACEWELL & PATTERSON
1808 First City National Bank Bldg.
Houston, Texas 77002 223-5361
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's Brief has been served upon Mr. Jake Johnson, of the firm of Johnson, Tarpey & Ritchie, 920 Houston Bar Center Building, Houston, Texas 77002, Attorney for Petitioner, by mailing copies to him at the address stated, first class, postage prepaid, on this 18th day of May, 1971.

Ronald C. Kline